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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. A-156, A-178, A-182

MARVIN FRIEDLANDER and MARVIN FILMS, INC.,
MARTIN ZIDE and ALLIED FILM EXCHANGE, INC., and
JEROME SANDY and AMERICAN INTERNATIONAL
PICTURES EXCHANGE OF WASHINGTON, D.C., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Judicial Circuit

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To the United States Court of Appeals
for the Sixth Judicial Circuit

The petitioners, Marvin Friedlander and Marvin Films, Inc., Martin Zide and Allied Film Exchange, Inc., and Jerome Sandy and American International Pictures Exchange of Washington, D.C., Inc., pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Judicial Circuit rendered in these proceedings on July 27, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Judicial Circuit, as yet unreported, affirmed the decision of the United States District Court for the Western District of Tennessee. The opinion of the Court of Appeals appears in Appendix A. The opinion of the District Court for the Western District of Tennessee, also unreported, appears in Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Judicial Circuit was entered on July 27, 1979. *See* Appendix A. This petition for certiorari was filed less than sixty days from the date aforesaid, an extension until September 25, 1979, for filing the petition having been granted each of these petitioners. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What are the constitutional standards required to establish a nationwide "wheel conspiracy" of an alleged pornographic film with the "Rim of the Wheel" composed of independent film sub-distributors doing business in various parts of the country?

2. Are there constitutional venue limitations to a so-called "national conspiracy" to prohibit trial in a district foreign to the activities (and respective community standards) of independent film sub-distribtuors?

3. Was the prejudice resulting from the pre-trial ruling that the *Miller* standard would be determinative of the obscenity of the film, and submission of evidence pursuant to that ruling, so

minimal that the error can be deemed harmless in light of the trial court's ultimate reliance on both the *Miller* and *Roth-Memoirs* standards?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law . . . .

Venue is also a constitutionally-guaranteed matter:

> The trial of all crimes, . . . shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed . . . .

U.S. Constitution, article III, § 2.

The petitioners were convicted of conspiring to distribute an obscene film in interstate commerce, in violation of 18 U.S.C. §§ 371 and 1462, the former of which provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The underlying offense, transportation of obscene matters, is defined in 18 U.S.C. § 1462:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or any other common carrier, for carriage in interstate or foreign commerce—
>
> (a) any obscene, lewd, lascivious, or filthy . . . motion-picture film, . . . or other matter of indecent character; or
>
> . . .
>
> (c) . . . any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or
>
> Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than 10 years, or both, for each such offense thereafter.

Rule 18 of the Federal Rules of Criminal Procedure describes the place of prosecution and trial:

> Except as otherwise permitted by statute or by these Rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of the trial within the district with due regard to the convenience of the defendant and the witnesses.

The "Harmless Error" statute, 28 U.S.C. § 2111, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

On February 15, 1973, the United States Grand Jury returned indictments charging the petitioners and other defendants with conspiring to distribute an obscene film, "School Girl." After pre-trial rulings concerning various standards which the district court considered applicable, the petitioners elected trial without a jury, with factual stipulations constituting the majority of the evidence. (The alleged interstate shipment of the film, including the testimony of Saul Shiffrin, various newspaper advertisements, and testimony with regard to subscriptions to *Weekly Variety* magazine, a trade publication were the stipulated subjects.)

The "Pre-Trial Stipulation Regarding Marvin Friedlander and Marvin Films, Inc." and "Additional Pre-Trial Stipulation of Marvin Friedlander and Marvin Films, Inc.," described the distribution by Marvin Films, Inc., of the film in New York and northern New Jersey only, admitted that Marvin Films, Inc., subscribed to the trade journal *Weekly Variety*, and stated that these petitioners acted as a film booking agent, or sub-distributor, between Sherpix, Inc., and the ultimate film exhibitor. Petitioners Martin Zide and Allied Film Exchange, Inc., stipulated that they had agreed to sub-distribute "School Girl" in the lower peninsula of Michigan, and that Allied Film Exchange, Inc., had never subscribed to either *Daily Variety* or *Weekly Variety*. Petitioner Jerome Sandy stipulated that he had subscribed to *Weekly Variety* during the period of No-

vember 12, 1971, to November 11, 1972, only, and that on behalf of petitioner American International Pictures Exchange of Washington, D.C., Inc., he agreed in a conversation with Saul Shiffrin of Sherpix, Inc., in or around 1969, to sub-distribute films in the area of the District of Columbia, Maryland, Virginia and portions of Delaware and West Virginia.

The indictment was based on the showing of "School Girl" in Memphis, Tennessee, although these petitioners have never had any connection with the film and its showing in Tennessee. The prosecution contended that the showing of the film in Memphis was an act of conspiracy between Sherpix and the sub-distributors which brought the alleged conspiracy within the jurisdiction of the trial court.

The distribution of this film was undertaken on a national basis by Sherpix, Inc. The film's popularity was such that Sherpix chose to utilize the services of independent sub-distributors, rather than dealing directly with the exhibitors in various locales. It was alleged that each of these petitioners was contacted, through the appropriate individual, by Sherpix, Inc., concerning sub-distribution rights to the film in generally specified geographical areas of the United States. As the trial court noted, each sub-distributor was assigned a specific geographical area with exclusive sub-distributor rights therein. Shipment of the film copies from one region to another was at the direction of the film's owner or distributor, who occasionally requested that a sub-distributor forward the film copy to the sub-distributor for another region. Each booking and play date was subject to Sherpix's approval before the film could be distributed to any theater. Further, Sherpix required the sub-distributor to collect daily box office reports and weekly settlement sheets from each theater to which the film was distributed.

The indictment charges Marvin Friedlander and Marvin Films, Inc., with participation in four specific shipments. On

April 25, 1972, the film "School Girl" was allegedly shipped from Scottsdale, Arizona, to Buffalo, New York, where Marvin Films, Inc., received the film. On June 1, 1972, the indictment charges that Sherpix, through Saul Shiffrin or Tom Berman, and Marvin Films, Inc., caused "School Girl" to be shipped from Buffalo, New York, to Ellis Gordon at Boston, Massachusetts. The indictment further alleges that on June 28, 1972, a copy of the film was shipped from Pittsburgh, Pennsylvania, to Marvin Films, Inc., at Buffalo, New York. The grand jury further charged that on February 16, 1972, Marvin Films, Inc., by and through Marvin Friedlander, president, caused "School Girl" to be shipped from Albany, New York, to Buffalo, New York. Thus, these petitioners were charged with receiving isolated individual shipments from Scottsdale, Arizona, and from Pittsburgh, Pennsylvania; with causing a shipment to be made from Buffalo, New York, to another individual in Boston, Massachusetts, and with shipping a copy of the film intra-state on one occasion, from Albany to Buffalo, New York.

The indictment alleges that a print of the film in question was shipped from Atlanta, Georgia, to petitioner, American International Pictures Exchange of Washington, D.C., Inc., at Alexandria, Virginia, said shipment having been made by Sherpix, Inc. It is further alleged that the petitioner, American International Pictures Exchange of Washington, D.C., Inc., acting by and through petitioner, Jerome Sandy, caused a print of the film to be transported by common carrier to a Norfolk, Virginia, theatre.

The Grand Jury charged that Sherpix, Inc., caused the film to be shipped by common carrier from Memphis, Tennessee, to petitioner, Allied Film Exchange, Inc., said shipment having been received at Detroit, Michigan. Thereafter, the indictment alleges, the petitioner Allied Film Exchange, Inc., acting by and through petitioner Martin Zide, caused two prints of the film to be shipped from New York, New York, to Oak Park, Michigan.

These petitioners elected a "truncated trial" based on the stipulated evidence and waived their right to a jury trial. The remaining defendants, Tom Berman, Lewis K. Scher, Arnold Jordon, Gordon Craddock, Craddock Films, Inc., Art Theater Guild, Inc., and Sherpix, Inc., were also charged under the conspiracy count of the indictment, but were acquitted of that charge after a jury trial. They were convicted of other charges but those convictions were reversed and the cases remanded.

Upon their non-jury trial before the Honorable Robert M. McRae, in the United States District Court for the Western District of Tennessee, the petitioners were found guilty of conspiracy. The United States Court of Appeals for the Sixth Circuit affirmed that decision, and these petitioners here seek a writ of certiorari to review those rulings.

REASONS FOR GRANTING THE WRIT

1. No Single General Conspiracy Was Proven Which Would Encompass the Acts of These Petitioners and Link Them to Any Such Conspiracy for Which Venue Could Properly Be Established in Memphis, Tennessee.

It was stipulated that these Petitioners entered into an oral agreement with Saul Shiffrin, an agent of Sherpix, Inc., to distribute the film "School Girl" in geographical areas respectively consisting of New York and northern New Jersey; Michigan's lower peninsula; and the District of Columbia, Virginia, Maryland, and portions of Delaware and West Virginia. There was no proof that these petitioners caused this film to be transported to or from Memphis, Tennessee, or that these petitioners had any connection whatsoever with Memphis, Tennessee. To sustain a conspiracy conviction against these petitioners, the prosecution was required to prove an over-all plan or conspiracy or a national conspiracy.

The government maintained that the proof showed the existence of a single over-all plan, with which theory the trial court and the Court of Appeals agreed. However, this finding ignores the requirement that the sub-distributors, as "spokes" of the conspiracy wheel, be aware of each other and act in furtherance of a single illegal enterprise. Without both of these elements, the alleged conspiracy lacks the "rim of the wheel" to enclose the spokes and tie them together in a single conspiracy. The spoke-conspirators must interact, in addition to sharing a common illegal objective. *United States v. Elliott*, 571 F.2d 880, 900 (5th Cir.), *cert. denied*, 99 S. Ct. 349 (1978); *United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977).

It is respectfully submitted that the distribution of a film in Memphis, Tennessee, by a film sub-distributor who had noth-

ing to do with these petitioners in New York, Michigan, or the District of Columbia, respectively, does not sufficiently establish the rim of the wheel to link these petitioners into a single conspiracy.

The Court of Appeals found that the "rim of the wheel" which tied the many defendants together in a single criminal undertaking was provided by the interdependence of the sub-distributors and agreement to act in concert with one another in circulating the film, adopting the position of the trial court that each of these spokes had an interest in the success or failure of the other sub-distributor-spokes.

This attempt to circumvent the requirements of *Kotteakos v. United States,* 320 U.S. 750 (1946), and its progeny is without factual support in the instant case. The evidence clearly indicated that each of the sub-distributors acted independently of the others, and that no single sub-distributor would be affected financially by the movie's success or lack thereof outside the region of the sub-distributor's exclusive distribution rights. Both of these facts operate to bring this case squarely within the holding of *Kotteakos.*

The most obvious ramifications of exclusive distribution rights having been granted to each of the petitioners in his or its respective geographical area by separate agreements with Sherpix are that only Sherpix management and the sub-distributor for a given area in which the film was playing would be concerned with the booking arrangements in that area, and that the benefits of the film's success in that area, measured by profits, would inure only to the persons active in the distribution efforts there. No nationwide sharing of profits among sub-distributors has been alleged or shown. Thus, the common purpose necessary to a valid conspiracy is absent from this case.

Neither has the interdependence of the sub-distributors been established. While occasional shipments from one regional sub-

distributor to another were made, these incidents were entirely at the direction and control of Sherpix and its officials. Having retained the ultimate power to approve or disapprove any given booking or dates of engagement, Sherpix was in the position of directing the flow of the various copies of the film from one engagement to another, with the concomitant power to direct a sub-distributor to forward a copy of the film in its possession to the city of the succeeding engagement, regardless of area boundaries.

The proof does not show the existence of the nationwide conspiracy alleged for the additional reason that in light of the acquittal of Sherpix and Art Theatre Guild, Inc., of the conspiracy charge, the alleged conspiracy lacked the requisite "hub." No indictment was brought against these corporations' executive vice-president, Saul Shiffrin, with whom the petitioners made arrangements for the film's distribution in the respective geographical areas.

Sherpix, the supposed hub, was not convicted of conspiracy even though Saul Shiffrin, its agent, employee, and vice-president acting in the course and scope of his duties, made all of the agreements to sub-distribute. It would be illogical and inconsistent to now allow Shiffrin to assume the position of the hub.

With inconclusive proof that these parties entered into the purported scheme with each of these respective petitioners, the evidence is patently insufficient to sustain the sub-distributors' convictions. *See Hyde* v. *United States,* 225 U.S. 347, 374-375 (1912).

Recognizing that there is no requirement of consistency of verdicts or judgments of conviction among codefendants, *Hamling* v. *United States,* 418 U.S. 87, 101 (1974), the petitioners insist that this rule must be qualified by the exception for con-

spiracies. The conviction of a single codefendant in a conspiracy trial cannot stand because of the requirement that "two or more persons conspire . . . ." 18 U.S.C. § 371. Despite the conviction of multiple defendants in the instant case, inherent in the very nature of the "wheel" conspiracy alleged is the fact that none of those convicted conspired among themselves; rather, each of them agreed with Sherpix, through Shiffrin, to handle distribution of "School Girl" in limited areas, subject to certain rights reserved by Sherpix. This type of conspiracy is more properly viewed as individual conspiracies linked only by the common identity of the master distributors, Sherpix and Shiffrin. Without those common key figures' convictions, none of the individual agreements can sustain conspiracy convictions as to the petitioner sub-distributors. 225 U.S. at 374-375.

2. **Venue for the Petitioners' Trial Was Improperly Laid in Memphis, Tennessee.**

The proof of venue is an essential element of the government's case, a burden imposed by Article III, Section 2 of the Constitution and restated in Rule 18 of the Federal Rules of Criminal Procedure. The purpose of this requirement is to prevent the government from choosing a favorable tribunal or one which may be unduly inconvenient to a defendant. *United States* v. *Boney*, 572 F.2d 397, 401 (2d Cir. 1978).

Venue in a conspiracy case may be laid where the conspiratorial agreement was made or where an overt act of the conspirators occurred. *Hyde* v. *United States*, 225 U.S. 347, 359-360 (1912). The agreements reached between Sherpix and these petitioners, respectively, were reached far from Memphis, Tennessee, in each instance. As discussed in the preceding section, not one of these petitioners was connected with any conspiracy to distribute the film "School Girl" in or through Memphis, Tennessee.

These petitioners committed no overt act in the Western District of Tennessee, nor were they part of any conspiracy there, so that Memphis, Tennessee, cannot be a proper venue for any action against these petitioners in connection with the distribution of the film. The mere fortuity that Sherpix caused a print of the film to be shipped on a single occasion from Memphis to petitioner Allied Film Exchange, Inc., is clearly inadequate to establish venue in Memphis, since Allied Film Exchange had neither knowledge nor control of the source of its shipment from Sherpix. The other petitioners were not shown to have received or made shipments to the Western District of Tennessee.

The prejudice inherent in being tried in an improper venue was further compounded in the instant case by the trial judge's refusal to consider contemporary community standards of any locale other than that of the trial, the Western District of Tennessee. The indictment having charged a nationwide conspiracy to distribute this film, the refusal to consider the contemporary community standards of other communities than those in which the trial was held violates the law announced in *Miller* v. *California*, 413 U.S. 15 (1973). That there is no single nationwide standard concerning obscenity determinations is readily acknowledged; as the court stated in *Miller*, "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 32-33.

Subjecting these petitioners to trial according to the contemporary community standards of the Western District of Tennessee, with which they have absolutely no connection in their respective distribution businesses, effectively establishes that community's standard as a nationwide standard by which obscenity is judged.

The obvious unfairness of applying only the contemporary standards of the forum community was noted by Frederick F. Schauer in his treatise, *The Law of Obscenity* (1976):

> The major difficulty with [applying the standards of the forum community] is that it can lead to the most extreme examples of forum-shopping by the prosecution. Guilt or innocence should not, and do not normally, turn on where the prosecution occurs, but this is the inevitable result when a major substantive element of the offense must, by definition, vary from place to place. The selection of the proper place then takes on greater importance. The dangers of selective prosecution become even greater in situations, such as this one, where the place of prosecution defines the offense charged. In a prosecution under 18 U.S.C. § 1461 for sending obscene matter through the mails, the prosecution could be at the place of mailing, the places of delivery, or any state through which the package passes. If the standards are different in each state, than a putative defendant may run the risk of prosecution under standards that he has no logical reason to believe will be employed, nor can he, with assurance, plan his activities to avoid those areas in which such activities are illegal. To the extent that the shift to local standards may involve the chilling effect on constitutionally protected material . . ., the uncertainty as to which community's standards will be applied increases the danger.

Id. at § 6.5, p. 128.

It was acknowledged in *Hamling v. United States*, 418 U.S. 87 (1974), that under proper circumstances, a district court could properly "admit evidence of standards existing in some place outside of [the trial] district . . . ." *Id.* at 106. A clearer case for application of external standards is difficult to imagine, yet the offers of proof concerning the standards of the petitioners' own

respective areas were flatly rejected.[1] This refusal constituted a clear abuse of discretion and requires reversal of the courts' actions below.

A chilling restraint of this magnitude must be deemed constitutionally impermissible, and is a point in need of clarification by this Court. *See* F.F. Schauer, *The Law of Obscenity* §§ 6.5 and 9.8 (1976).

3. **The Petitioners Were Clearly Prejudiced by Being Tried Improperly Under the Obscenity Standard Set Forth in Miller v. California, 413 U.S. 15 (1973).**

The District Court delayed in rendering its decision for approximately one and one-half years during which time the opinion in *Marks v. United States*, 430 U.S. 188 (1977), was handed down. Appendix B at 20. *Marks* clearly states that the correct standard for obscenity to be applied to alleged criminal conduct which occurred prior to the adoption of the standard announced in *Miller v. California*, 413 U.S. 15 (1973), is that test as stated in *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Petitioners were indicted in 1973 for acts in 1971 and 1972; the *Marks* decision is therefore controlling as to their alleged criminal conduct.

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[1] After the prosecution introduced proof concerning an X-rated film, "The Stewardesses," counsel for petitioners Jerome Sandy and American International Pictures Exchange of Washington, D.C., Inc., asked the court to consider that the film had been approved by the Maryland Board of Censors on June 8, 1971. Counsel for the remaining petitioners joined in that action, but the court replied:

> I don't mean to get into any hassle with the Maryland Board of Censors, but it is entirely possible they may have accepted something that wouldn't pass muster. . . . I don't think all these remarks are necessarily true, and I make no apologies for having your client here, Mr. Neal, he is a citizen and was indicted by lawful process, and we are going to see it through.

III Appellate appendix at 651 (Trial transcript, morning session, January 6, 1976, at 267.).

Although the Court of Appeals found that the trial court had rendered its opinion based upon the application of both the *Miller* and *Roth-Memoirs* standards for assessing obscenity, the petitioners and their co-defendants had presented evidence at the trial in the belief that the *Miller* standard alone would be used, as ordered by the trial court on December 12, 1975. This change of standards after the conclusion of the proof was error and clearly operated to the prejudice of the petitioners. These petitioners have the right to be tried with the benefits of the *Roth-Memoirs* standard, which requires in part that the allegedly obscene material be "utterly without redeeming social value" rather than merely lacking "serious literary, artistic, political or scientific value," as required by *Miller*. The *Memoirs* test further required that the material's dominant theme, taken as a whole, appeal to a prurient interest in sex and that the material be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." 383 U.S. at 418. By contrast, the *Miller* guidelines focus on the work's serious value, "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest . . . [and] whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . ." 413 U.S. at 24.

Further, the trial court addressed only summarily the issue of whether the *Miller* standard was met. The trial court stated that its finding that "School Girl" was obscene was made by "applying tests set as required in *Marks*." Appendix B at 21. There is no elaboration as to the benefits of the *Roth-Memoirs* test to which the petitioners are entitled under *Marks*.

The Court of Appeals recognized that "prejudice to substantial rights could exist by a mid-stream change in the rules such as occurred here [, but was] unable realistically to con-

ceive of any prejudice upon this record." Appendix A at 6. Because the trial court indicated that its ultimate decision was rendered through the application of both the *Miller* and *Roth-Memoirs* tests, the Court of Appeals minimized the likelihood of prejudice, and in this regard the appellate decision is in error. In light of the trial court's earlier ruling that *Miller* would govern the determination of obscenity, any effort made by the petitioners to show that the film was not obscene when judged by the standards of *Roth-Memoirs* would have been futile. It cannot be said that the petitioners' substantial rights were unaffected by this error, rendering the harmless error statute inapplicable. 28 U.S.C. § 2111. This was reversible error.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Judicial Circuit.

Respectfully submitted,

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September 25, 1979

APPENDIX

APPENDIX A

Nos. 77-5367-8-9-70-71

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.

Jerome Sandy and American International Pictures Exchange of Washington, D.C. (77-5367),

Ellis Gordon (77-5368),

Marvin Zide and Allied Film Exchange, Inc., (77-5369),

John O. Glaus (77-5370) and

Marvin Friedlander and Marvin Films (77-5371),
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed July 27, 1979

Before: Engel and Keith, Circuit Judges and Peck, Senior Circuit Judge.

Engel, Circuit Judge. Appellants were convicted in a non-jury trial of conspiring to distribute an obscene film, "School Girl", in interstate commerce, in violation of 18 U.S.C. §§ 371 and 1462 (1976). Their principal claim in this appeal is that

they were prejudiced because the case was tried under the obscenity standards of *Miller* v. *California*, 413 U.S. 15 (1973), only to be decided later by the trial judge under pre-*Miller* standards.

We hold upon the record before us that there was no prejudice which affected the substantial rights of the appellants and, finding no other error in the trial, affirm the convictions.

The indictment, returned by a federal grand jury in Memphis, Tennessee, on February 15, 1973, charged 25 individuals and organizations with conspiring to distribute "School Girl" in interstate commerce. The detailed allegations of the indictment and the overt acts expressly incorporated in its described activity which commenced with the production of the motion picture by certain of the conspirators, the sale of the rights in the movie to the defendant Sherpix for a total of $41,000, and the subsequent distribution for public exhibition of the film throughout the country by means of the various services offered by the remaining named defendants. The conspiracy charge, which was embraced in count 1 of the indictment, was fortified by five additional counts in which certain of the conspirators were charged with the substantive offenses of shipping the film in interstate commerce by use of a common carrier, contrary to 18 U.S.C. §§ 1462 and 2.

Of the 25 defendants charged in the conspiracy count, 15 waived jury and elected to be tried before the district judge. Seven other defendants, including all who were tried on the substantive charges, proceeded to trial by jury immediately following the non-jury trial of the appellants involved here.[1]

All of the defendants who insisted upon their right to jury

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[1] As for the remaining three alleged conspirators, John O. Glaus Agency was not tried, although appellant John O. Glaus, individually, was tried and convicted. Paul David Gerber a/k/a David Reberg,

trial were acquitted on the conspiracy count but were found guilty of the several substantive offenses charged against them.[2] Conversely in the non-jury trial before District Judge Robert M. McRae, Jr., three defendants were acquitted and the remaining twelve were convicted, eight of whom have appealed here.

I

In the non-jury trial held January 5-6, 1976, District Judge Robert M. McRae, obedient to our circuit's decision in *United States* v. *Marks*, 520 F. 2d 913 (6th Cir. 1975) (*Marks I*), considered that his determination of the issue of obscenity was to be governed by the standards set forth in *Miller* v. *California*, 413 U.S. 15 (1973), although all events alleged in the indictment occurred before *Miller* was decided. However, after the trial of the case but before filing his decision and entering judgment, the district judge learned that the Supreme Court had granted certiorari in *Marks*, *supra*, and accordingly delayed further proceedings in the case until the appeal was decided. On March 1, 1977, the Supreme Court held that persons indicted for conduct occurring before *Miller* were entitled to all of the benefits which *Miller* might confer, but were also entitled to application of the pre-existing *Roth-Memoirs*[3] test of obscenity, which primarily provided that materials could not be found to be obscene unless they were "utterly without redeeming social value." *Marks* v. *United States*, 430 U.S. 188, 196-97 (1977) (*Marks II*). On July 28, 1977, approxi-

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one of the conspirators responsible for the production of "School Girl," apparently was not apprehended and brought to trial. A third defendant, Bernard Levy, was dismissed by an order of *nolle prosequi*.

[2] The trial court later ordered new trials because the jury had been erroneously charged on the definition of obscenity.

[3] *Roth* v. *United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

mately five months after the Supreme Court's decision in *Marks II*, Judge McRae filed his findings of fact and conclusions of law. Applying both the *Miller* and *Roth-Memoirs* tests,[4] he adjudged the film to be obscene and found the appellants guilty.

As noted in *Hamling* v. *United States*, 418 U.S. 87, 99 (1974), the definition of obscenity announced in *Roth* was substantially refined by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). To fall outside constitutional protection under *Memoirs*, "it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. at 418.

Miller v. *California, supra*, revised the *Roth-Memoirs* test determining obscenity in the following language:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific values.

Miller v. *California, supra*, 413 U.S. at 24. The standards announced in Miller were made applicable to federal obscenity trials in *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 129-30 & n. 7 (1973).

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[4] The appellants' claim that the trial court in fact only applied the *Miller* test is not correct.

No appellant has disputed the trial judge's factual description of the content of "School Girl":

> The school girl portrayed in the movie is a college student who undertakes to research a sex subculture. In order to do this she responds to certain classified ads in the college underground newspaper. This leads to a series of sexual episodes which include having sexual intercourse with a husband under the wife's direction and ultimate participation as a third party, mutual masturbation pursuant to direction from a man over the telephone, sexual intercourse oral and otherwise with a father and son team, and a group sex orgy. In addition, there are episodes in which complete actual and prolonged sexual intercourse between the school girl and her boyfriend is shown. There is a similar episode portrayed between the school girl's female roommate and the school girl's male professor who called at their apartment to inquire about the welfare of the school girl. In addition the school girl and her female roommate are shown in a prolonged lesbian episode.
>
> All episodes show close shots of the genitals of the participants during the sexual encounters.[5]

No party has claimed tht under either test the film is constitutionally protected as a matter of law.[6] The issue, there-

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[5] Upon express inquiry by the court at oral argument, all parties expressed the opinion that it was not necessary to the appeal that the judges view the film. *See United States* v. *Marks*, 585 F. 2d 164, 171 (6th Cir. 1978) *(Marks III)*. We therefore accept the trial court's account as accurate.

[6] It seems to be characteristic of this kind of case that it is susceptible to many hypothetical dangers—dangers that innocent and unsuspecting defendants will be swept into the conspiracy dragnet, and dangers arising out of a very justifiable sensitivity to First Amendment rights. *See, e.g., Paris Adult Theatre I* v. *Slayton*, 413 U.S. 49, 83-101 (1973) (Brennan, J., dissenting). Nevertheless, on a case-by-case basis, those dangers turn out to be more theoretical

fore, is whether any prejudice affecting the sustantial rights of the defendants occurred because the case was tried under the *Miller* standards, but was finally decided under both *Miller* and pre-*Miller* standards.

We conceive that prejudice to substantial rights could exist by a midstream change in the rules such as occurred here.[7] We are, however, unable realistically to conceive of any prejudice upon this record.

Having lost below, all appellants indicate in this appeal that they wish to have a new trial based upon pre-*Miller* standards. There is, however, no complaint that the district court erred in excluding any evidence proffered by the defendants, although they now claim that the making of an offer of proof would have been an expensive and futile gesture in view of the court's pretrial ruling that *Roth-Memoirs* would not be applied. *But see* Rule 103(a)(2), Fed. R. Evid. While there was some suggestion on appeal that certain of the defendants might have wished, as a matter of afterthought, to introduce further expert testimony on the obscenity question and its application under pre-*Miller* standards, nothing concrete has been offered or even suggested which would indicate

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than real, for rarely is it argued with any force that the material in question is as a matter of law not obscene, and that claim is not made here. One reason for this, we suspect, is that where material has any remote relation to the values protected by the obscenity tests, a generally tolerant society tolerates it in all events. A second, more important reason, we suspect, is that the commercial marketability of obscene materials depends in major part upon the very absence of those qualities which lift that material into the area of First Amendment protection.

[7] Judge McRae, in fact, for this reason set aside the jury conviction of the co-defendants and ordered a new trial under pre-*Miller* standards. There is, however, a substantial difference between the defendants tried to the jury and those who opted for trial to the court. The jury had been charged only according to *Miller* standards, while the judge in the bench trial expressly evaluated the film under both *Miller* and *Roth-Memoirs*.

how the defendants would have conducted themselves differently, had it been known at the time of trial that pre-*Miller* standards were still applicable.

More particularly, certain appellants, notably Gordon, complain that the submission of the case on the *Miller* standards denied them an opportunity to "present evidence or argue that the film did not violate the *Memoirs* test, particularly the last part, requiring that the material be 'utterly without redeeming social value' for it to be found obscene." The simple answer to this, as we mentioned above, is that no offer was ever made, although many months elapsed from the date of trial due to the trial court's decision to wait for further guidance from the Supreme Court. More particularly, despite an interval of nearly five months between the Supreme Court's decision in *Marks* and Judge McRae's opinion, not one defendant sought any right to re-argue the case under the old standards, or to submit additional evidence or to make any offer of proof as to what additional evidence he wished to submit, once the standard had been clarified. We can only view this, therefore, as an effort to obtain a second bite of the apple, and not as any claim of serious prejudice to any right of fair trial.

A somewhat similar problem arose in *Hamling v. United States, supra,* when it appeared that the instructions given by the district court in the jury case made occasional reference to the community standards of the "nation as a whole," thereby delineating a wider geographical area than normally would have been warranted by *Miller*:

> In the unusual posture of this case, in which petitioners agree that the challenged instruction was proper at the time it was given by the District Court, but now seek to claim the benefit of a change in the law which casts doubt upon the correctness of portions of it, we hold that reversal is required only where there is a probability that

> the excision of the references to the "nation at a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. [citations omitted] Our examination of the record convinces us that such a probability does not exist in this case.

Hamling, supra, 418 U.S. at 108. Of course, the likelihood of prejudice is even less in the instant case than in *Hamling,* since Judge McRae, as trier of fact, properly recognized and applied both the *Miller* and *Roth-Memoirs* tests in judging the obscene nature of the film.

We are convinced that under the circumstances here, neither the parties' trial strategy, their decision to have waived a jury, nor the trial judge's consideration of the evidence, were adversely affected by the fact that the case was tried upon the understanding of the law prevailing in our circuit and decided on a somewhat variant and later construction announced by the Supreme Court. Had the record shown some meaningful distinction which could have affected the result here and which would render it unfair for the parties to be bound by the trial court's decision, we would not hesitate to reverse. Such is not the state of the record here.

II

Each appellant argues, in one form or another, that he is entitled to acquittal as a matter of law because the evidence was insufficient to connect him with one common enterprise which would qualify as a criminal conspiracy. As indicated earlier, the jury trial of the remaining defendants named in the indictment followed the non-jury trial before Judge McRae here and resulted in acquittal of the defendants therein of the conspiracy charge, although they were found guilty on substantive counts of transporting obscene material in interstate commerce by use of a common carrier. It is the claim of

appellants that the government alleged a "wheel" type of conspiracy in which Art Theatre Guild and its subsidiary, Sherpix, as the owner and original distributor of the movie, were the hub, and in which the appellants, if anything, were merely spokes of the wheel having no relationship one to the other except through their common relationship with Sherpix and Art Theatre Guild. Because Sherpix and Art Theatre Guild were acquitted of the charge of conspiracy in the jury trial, the defendants reason that they must likewise be acquitted since it has been adjudicated through the acquittal, they claim, that Sherpix and Art Theatre Guild were not conspirators.

They place reliance upon a number of decisions which in effect hold that where all other alleged co-conspirators are acquitted of a conspiracy, the conviction of one person on that charge cannot be upheld, since it takes at least two to commit the offense. *E.g.*, *United States* v. *Williams*, 503 F. 2d 50, 54 (6th Cir. 1974). *See also United States* v. *Lester*, 363 F. 2d 68, 72 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). However this may be, and there is indeed much authority to the contrary commencing with *Dunn* v. *United States*, 284 U.S. 390 (1932) (Holmes, J.), and proceeeding through *Hamling* v. *United States, supra*,[8] our careful examination of the record here persuades us that in all events, the essential link in the conspiracy was not missing here. Unindicated but named co-conspirator Saul Shiffrin, Executive Vice President of Sherpix and Art Theatre Guild, supplied that link

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[8] "It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required." 418 U.S. at 101. *See also United States* v. *Rowan*, 518 F. 2d 685, 689 (6th Cir.), *cert. denied*, 423 U.S. 949 (1975) ("[a] jury is free to render inconsistent verdicts or to employ relevant evidence in convicting on one count that it may seem to have rejected in acquitting on other counts."); *United States* v. *Fleming*, 504 F. 2d 1045, 1055 (7th Cir. 1974); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 974 & n. 401 (1959).

in ample measure and it was his testimony which connected the defendants one to another and laid the cornerstone of the successful prosecution of the conspiracy. The indictment alleged and the proofs showed numerous overt acts undertaken by Shiffrin, notably arranging to transport the film into and out of the district of trial and contracting for the subdistribution of "School Girl" with the defendants.

The court, sitting as a trier of fact, specifically found that a conspiracy existed between the appellants and Shiffrin. Shiffrin's testimony, which was introduced at trial through his affidavit, amply supports that finding. *United States* v. *Shipp*, 359 F. 2d 185 (6th Cir.), *cert. denied*, 385 U.S. 903 (1966). Likewise, it is immateral that Shiffrin was not himself charged in the indictment; he was named as an unindicted co-conspirator and the evidence at trial connected him with the conspiracy. *Feldstein* v. *United States*, 429 F. 2d 1092, 1095 (9th Cir.), *cert. denied*, 400 U.S. 920 (1970). *See also Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, at 972-73 (1959).

It is a well-established general rule that inconsistent jury verdicts are not fatal to a conviction, they being "one of the consequences which we accept under our jury system," *Miller* v. *California*, 413 U.S. at 26 n. 9. *See also Dunn, supra*, 284 U.S. at 393-94, and *Hamling, supra*, 418 U.S. at 100-01. In view of this authority we think that the rule in *Williams* and like cases is necessarily confined to those circumstances in which the allegations of the indictment and the proofs at trial admit of no other conspiratorial agreement than that existing between the one convicted defendant and other conspirators, all of whom have been acquitted of the specific charge. *Developments, supra*, 72 Harv. L. Rev. at 972-73, and cases cited therein. This circumstance does not exist in the instant case.

Allied with the claim of insufficiency of the evidence is the claim of several of the defendants that not one but several conspiracies were shown because the proofs indicated only individual, isolated agreements to acquire and display the film, rather than the single, unified conspiracy, which appellants claim is necessary to their joint trial and conviction. Essentially the defendants rely upon *Kotteakos v. United States*, 328 U.S. 750 (1946), and its justifiable concern that in conspiracy cases the defendants have a right "not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others. . . ." *Id.* at 775. *See also United States v. Mayes*, 512 F. 2d 637, 642-43 (6th Cir.), *cert. denied*, 422 U.S. 1008 and 423 U.S. 480 (1975). If anything, the conspiracy here alleged and proved has a singular unity in its confinement to the distribution in interstate commerce of but one film. It is apparent that by narrowly describing the conspiracy, many of the legitimate apprehensions of injustice reflected in *Kotteakos* were avoided. As the trial court noted in its findings of fact:

> Because there are a limited number of copies of the film, it is understood and agreed by those members of the distribution network that they will ship the copies to other areas (interstate) when directed to do so by the owner or distributor of the film. The proof reflects that this was not only agreed to but was done by some of the sub-distributors. . . .
>
> Furthermore, the sub-distributors and the distributor were financially interested in an efficient and systematic method of making the copies available when and where needed.

The interdependence of the sub-distributors and their agreement to act in concert with one another in the circulation of the film provided the "rim of the wheel" and thus tied them together in a single criminal undertaking. *Kotteakos, supra*, 328 U.S. at 755; *Mayes, supra*, 512 F. 2d at 642-43; *United States v. Vartelli*, 407 F. 2d 735, 741-42 (7th Cir. 1969), *appeal after remand*, 467 F. 2d 1032 (7th Cir. 1972), *cert. de-*

nied, 410 U.S. 982, 990 (1973). It, therefore, appears to us from the evidence here that one conspiracy was shown to have existed, a conspiracy to participate in the interstate distribution and showing, for profit, of "School Girl."[9]

III

Appellants also claim that the acquittal of Sherpix, Art Theatre Guild, and sub-distributor Gordon Craddock and Craddock Films, *inter alia*, in the earlier jury trial as a matter of law deprived the Western District of Tennessee of venue since "all allegations of overt acts committed in the Western District of Tennessee are those of Sherpix, Inc., Art Theatre Guild, Inc., Gordon Craddock and Craddock Films, Inc." The claim is simply without factual support in the record. The indictment also alleged, *inter alia*, overt acts committed by unindicted co-conspirator Shiffrin, and the evidence supported those allegations. More fundamentally, however, we do not view the acquittal of Sherpix, Art Theatre Guild, Craddock and Craddock Films on the conspiracy charge as conclusive evidence that, for the purposes here, they did not actually commit the overt acts charged to them in the indictment. *See United States v. Samuel Dunkel & Co.*, 184 F. 2d 894, 898 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951). In fact, all four were convicted on substantive counts which formed the basis of the overt acts alleged to have been committed by them in the conspiracy count.

We know of no rule which obliges a trier of fact to disregard the evidence relating to a defendant who has been acquitted of a particular crime in the trial of a co-defendant. As

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[9] It might be that the defendants, or some of them, were equally guilty of conspiring to distribute other obscene films and that conduct was also a part of the "School Girl" conspiracy. That, however, need not concern us here. Defendants could not be injured if the government elected to confine itself to the narrower aspects of a single conspiracy.

earlier mentioned, the rule in *Williams, supra,* relied upon by defendants, is not a rule of evidence but of sufficiency. Therefore, where the sufficiency is fully shown by the participation of unindicted co-conspirator Saul Shiffrin, that issue is at an end.

The proofs clearly show several overt acts occurring in the Western District of Tennessee. The trial court specifically found that "Sherpix and Art Theatre Guild, acting through its authorized employees caused 'School Girl' to be shipped in interstate commerce to Memphis, Tennessee (Western District of Tennessee) on or about March 1, 1972." Shiffrin's testimony indicates he personally arranged for the transportation of the film into Memphis. On June 15, 1972, Sherpix caused a print of "School Girl" to be shipped by common carrier from Memphis to appellant Allied Film Exchange in Detroit, and again on June 5, 1972, Gordon Craddock, at the direction of Shiffrin, caused a print of the movie to be shipped by interstate commerce to Memphis and subsequently to Springdale, Arkansas, from Memphis. Venue for the conspiracy count was properly laid in the Western District of Tennessee. *Hyde v. United States,* 225 U.S. 347, 365-67 (1913); Rule 18, Fed. R. Crim. P.

Closely allied to the foregoing argument is the claim that the various defendants were unfairly tried in Memphis because the allegedly puritanical local standards of that community subjected them to judgment of guilt based upon standards which might not exist in the several other areas of the country where they had displayed or circulated the film. We view this claim as but another facet of the same venue argument.

Once the conspiracy to which they belonged was shown to have extended to and operated in Memphis, the defendants had no right to have the obscenity of the film tried according to tha community standards of other localities in which they might conceive public attitudes to be more permissive. In *Art Theatre*

Guild, Inc. v. Parrish, 503 F. 2d 133 (6th Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), wherein we ruled on a motion for return of the same seized film, we observed:

> The Supreme Court in *Hamling v. United States*, . . . touches on this problem [prosecution of a nationwide conspiracy case] and indicates how a district judge sitting in one district can handle the "contemporary community standard" requirement when faced with a federal prosecution and the need to consider its application in several districts.

Id. at 137 . *Hamling* indicates that even where a federal obscenity offense is multistate in its scope, the community standards of the locality of trial, not some "hypothetical and unascertainable" nationwide standards, are to be applied:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.
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> * * *
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> The result of [*Miller v. California* and companiion cases], therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusions "the average person, applying contemporary community standards" would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

418 U.S. at 104, 105-06.

While the appellants have not argued that the nationwide scope of the conspiracy requires application of a national standard in judging the film, they claim that the trial court should have applied a multitude of local standards, depending upon the distribution area which each conspirator served. This is not the law under either *Miller* or pre-*Miller* standards, as *Miller* and *Hamling* clearly demonstrate. *Hamling* contemplates that persons guilty of substantive offenses which overlap judicial districts subject themselves to the application of varying local standards, depending upon the locality of trial, and we see no reason to devise a different rule for multistate conspiracies:

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions. In *Miller* v. *California*, 413 U.S., at 32, we cited with approval Mr. Chief Justice Warren's statement:
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> > "[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but

> not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." *Jacobellis* v. *Ohio*, 378 U. S. 184, 200-201 (1964) (dissenting opinion).

Hamling, supra, 418 U.S. at 106-07. Having voluntarily chosen to enter a conspiracy of national scope, appellants limited their right to be tried according to the standards of the localities in which their operations are centered.

A related claim is appellants' assertion that the district court abused its discretion in failing to permit introduction of evidence concerning the standards of communities outside the Western District of Tennessee. It is true that prior to trial, counsel for Gordon indicated a desire to offer evidence concerning the prevailing standards of New England, to which the trial judge replied, "I don't think we need any proof along those lines." This ruling was made in advance of the trial and counsel never stated what proof they intended to offer into evidence, nor was any formal offer of proof made at trial. Assuming, without deciding, that the pretrial offer and the judge's ruling were sufficient to preserve the issue for review at this stage, *but see* Fed. R. Evid. 103(a)(2), we nevertheless read *Hamling* as leaving such decisions largely to the discretion of the trial judge,[10] a discretion which we find was not abused under the circumstances here.

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[10] After holding that the trier of fact in a federal obscenity prosecution should draw upon the community standards of the vicinage of trial, *Hamling* noted:

> [b]ut this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issue which they were to decide.

418 U.S. at 106.

IV

Appellants Sandy and Friedlander particularly complain that the evidence was insufficient to uphold the district court's finding that they possessed the requisite scienter concerning the nature of the film. No claim is made that the district court misreprehended the governing legal principles. In this respect the trial judge correctly followed *Hamling* to observe that "it is not necessary for the government to prove that the conspirators had actual knowledge that the film was obscene. The scienter required to support a conviction is that they knew the general nature and character of the films." *See Hamling, supra,* 418 U.S. at 123.

While necessarily circumstantial, the evidence nevertheless strongly supports the trial judge's finding in this respect. The evidence indicated extensive discussions between Shiffrin and the defendants with respect to the film and its display elsewhere. The finder of fact, whether trial judge or jury, is not obliged to lay aside his general knowledge of life in evaluating the evidence and the several communities which were a part of the evidence. There was proof that some of the appellants handled other sexually explicit films for Sherpix. There was evidence that, as part of his sales pitch, Shiffrin represented to each sub-distributor that the film had been shown at the Lido East and Cini Lido in New York, known in the industry as theaters specializing in the exhibition of X-rated films. The defendants knew that the film was itself X-rated.[11] While some X-rated

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[11] Although Sandy asserts that there is no evidence that an X-rating generally contemplates sexually explicit material, we find applicable to the trial judge's role in non-jury cases the same observations we made with respect to jury's general knowledge in *United States v. Jones,* 580 F. 2d 219 (6th Cir. 1978).

> While Wigmore notes that "[t]he range of [a jury's] general knowledge is not precisely definable," [9] *Wigmore [on Evidence]* § 2570 at 546 [(3d ed. 1940)], "the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental

films may not be obscene, it asks too much of credulity to expect that under the circumstances the defendants could not have known of the general nature and character of "School Girl," even though there may not have been proof that they actually viewed the film. There is thus substantial evidence to support the trial judge's finding that these defendants possessed the necessary degree of scienter.

V

Finally, appellant Friedlander claims that his constitutional right to a speedy trial was violated in the delay between the return of the indictment in February, 1973 and the trial before Judge McRae in January, 1976. He claims particular prejudice stemming from the death of the other principal employee, besides himself, of Marvin Films, who, it is claimed, would have testified at the trial. No effort is made to show how the four-pronged test of *Barker v. Wingo*, 407 U.S. 514 (1972), applied here, would produce a holding of constitutionally impermissible delay, and we find none.

The remaining allegations of error are mostly variations of those already discussed. We find no merit in them.

Affirmed.

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experience in human nature, commercial affairs, and everyday life." *Id.* at 544. This category of fact is not so much a matter of noticing facts outside the record as it is a matter of the communication value of the words used, which can only be understood in the light of the common experience of those who employ them. *See generally* K. Davis, Administrative Law Text § 15.06 at 305 (3d ed. 1972).

Id .at 222. The trial court did not err in its understanding of the term, "X-rated."

APPENDIX B

In the United States District Court
For the Western District of Tennessee
Western Division

United States of America,
Plaintiff,
vs.
Paul David Gerber, et al.,
Defendants.
No. CR-73-45

MEMORANDUM DECISION SETTING FORTH FINDINGS OF FACTS AND CONCLUSIONS OF LAW

On January 5, 1976 and January 6, 1976, Richard Louis Miller; Ellis Gordon; Marvin Friedlander; Marvin Films, Inc.; Martin Zide; Allied Film Exchange, Inc.; Jerome Sandy; American International Pictures Exchange of Washington, D.C., Inc.; Abbott Morton Swartz; Independent Film Distributors, Inc.; Emanuel Youngerman; M.Y. Film Company, Inc.; John O. Glaus; Lou Wolff; and Harry Brandt Booking Office, Inc., all defendants in the instant case, participated as defendants in a non-jury trial concerning the offense alleged against them in the Indictment in the instant case.

Immediately thereafter a protracted jury trial was conducted with regard to certain other individual and corporate co-defendants in this cause. In that trial, the issue of obscenity was vigorously contested. Upon the basis of *USA* v. *Marks*, 520 F.2d 913 (C.A. 6, 1975), the standard for determining obscenity was considered to be those standards enumerated in the *Miller*

v. *California*, 413 U.S. 15 (1973) and other cases decided on the same date, even though the alleged criminal conduct occurred before Miller was announced.

With regard to the defendants who agreed to this non-jury trial, it was agreed that these defendants would not offer expert proof upon the issue of obscenity, and that this issue would be determined by the Court, based upon the Court's viewing of the movie at the same time that the jury viewed the movie for the purpose of determining whether the movie was obscene in the matter of the trial of the other defendants.

After the jury trial of the other defendants, but before this Court sentenced those found guilty and before the Court filed its Findings of Facts in this phase of the case, it was learned that the United States Supreme Court had granted *certiorari* in *U.S.* v. *Marks*, 424 U.S. 942 (1976). Pending a ruling in that case, all phases of the instant case were stayed. On March 1, 1977, the Supreme Court issued its ruling in *Marks*, which reversed the Court of Appeals for the Sixth Circuit and held that certain *Miller* v. *California, supra*, standards did not apply to pre *Miller* conduct.

This is the belated ruling upon the non-jury phase of the case. All of the defendants being considered were indicted in Count I of the Indictment, which charged that these defendants and all other defendants in the case were engaged in a conspiracy to violate the laws pertaining to transportation of obscene moving picture film.

Conspiracy

All the defendants are said to have been members of a conspiracy, the main purpose of which was to knowingly use common carriers in interstate commerce in order to transport an obscene movie entitled "School Girl." There are fifteen defendants included in this ruling. All but one of these defendants,

Richard Lewis Miller, are individuals or corporations that were engaged in the business of distributing motion picture films in accordance with a system of distribution which has evolved in the motion picture industry.

Twelve of these fifteen defendants are composed of six pairs of individual defendants who are affiliated with corporate counterparts, i.e., Marvin Friedlander and Marvin Films, Inc.

The defendant named in the Indictment as "Richard Lewis Miller, a/k/a R. L. Mills" was shown by the proof to be Richard Louis Miller, who also used the name of R. L. Mills in the matter of his participation in the production and sale of the motion picture "School Girl."

The defendant Richard Louis Miller, under the name of R. L. Mills produced the motion picture film entitled "School Girl," and allowed this fact to be advertised by including this fact as a part of the introduction of motion picture film in that portion of the film normally referred to as the credits.

Prior to August 26, 1971, the defendant Richard Lewis Miller, along with Paul David Gerber, owned all rights and interest in and to the film entitled "School Girl." On August 26, 1971, the defendant Richard Louis Miller and Paul David Gerber in the State of California sold all of their interest in the motion picture film entitled "School Girl" to Sherpix, Inc., another defendant, and received $41,000 at San Francisco, California, which payment included payment for a complete and final transfer of all rights, title, and interest in and to the motion picture film "School Girl."

In connection with the transfer, Richard Louis Miller agreed by written instrument to indemnify Sherpix, Inc., for any claim by R. L. Mills; and Sherpix, Inc., by written agreement, agreed not to use the name Paul David Gerber in the distribution of said film in any connection as the maker of said motion picture film.

Prior to the time of the purchase of "School Girl" and subsequent thereto, Sherpix engaged in the business of distributing motion pictures. Art Theatre Guild, Inc., which operated theatres throughout the United States, and Sherpix were owned and controlled at all times relevant hereto by Louis K. Sher, an individual co-defendant not covered by this ruling. Sherpix had distributed a variety of types of motion picture films. However, it had begun to concentrate on X-rated sexually explicit movies.

In the film business a motion picture is customarily manufactured or created by a person called a producer. Once a film is created, arrangements are customarily made with a so-called distributor to sell the film to exhibitors. The distributor is responsible for all of the details involved in distribution of the film, including the preparation of advertising materials, shipment of prints, availability of prints and similar matters. Bookers are people or companies that arrange films for exhibitors.

The exhibitor and the distributor customarily agree that the exhibitor will have a copy of one of the prints of the motion picture for a given period of time, and in exchange the exhibitor agrees to remit to the distributor a certain prearranged percentage of the monies received from paying patrons.

If a film becomes sought after by many exhibitors, the distributor will utilize sub-distributors to assume responsibility for the distribution of the film in separate geographical areas which have been assigned to the sub-distributors by custom within the industry.

In those instances where a sub-distributorship is involved, the exhibitor customarily remits a percentage of the monies received from paying patrons to the sub-distributor, who then divides this amount according to an agreed percentage with the prime distributor.

After August 26, 1971, Sherpix undertook the distribution of the film "School Girl" on a national basis. Sherpix arranged for the exhibition of the film "School Girl" at the Cine Lido Theatre and the Lido East Theatre in New York City, which theatres had reputations in the motion picture industry for showing sex-oriented films.

The use of sub-distributors commenced after distribution of "School Girl" had become so widespread and extensive and the demands on Saul Shiffrin, an executive of Sherpix, so great that it became profitable to Sherpix to utilize services of sub-distributors in the continued distribution of "School Girl."

No written agreements were made with any sub-distributor for the distribution of the film in any given geographical area.

Saul Shiffrin was familiar with the people who acted as independent sub-distributors in various areas of the United States and had known them all well as a result of prior contact in the motion picture industry.[1]

Sherpix reserved to itself the right of approval of the exhibition of the film "School Girl" in any theatre, including the theatres operated by its affiliate, Art Theatre Guild.

Basically, each sub-distributor was assigned a specific geographical area, and he was the exclusive sub-distributor within that geographical area.

Because there are a limited number of copies of the film, it is understood and agreed by those members of the distribution network that they will ship the copies to other areas (interstate)

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[1] Saul Shiffrin was granted immunity and furnished much of the information and testimony in various phases of this case, albeit at times reluctantly. Trial Exhibit 1 in this phase of the case is a 19-page stipulation of his testimony.

when directed to do so by the owner or distributor of the film. The proof reflects that this was not only agreed to but was done by some of the sub-distributors.

Since 1958, Ellis Gordon has been in business as an independent sub-distributor of motion picture films. Ellis Gordon operated Ellis Gordon Films as a sole proprietorship approximately thirteen years prior to February 23, 1972. During the period February 23, 1972 through September 17, 1975, Ellis Gordon Films was operated by Ellis Gordon and Michael Fleischer as a partnership.

As a sub-distributor, it was the responsibility of Ellis Gordon Films to find exhibitors for such films as were assigned to it for distribution by a producer or nation-wide distributor.

In 1968, Ellis Gordon, on behalf of Ellis Gordon Films, agreed with Saul Shiffrin acting on behalf of Sherpix that Ellis Gordon Films would distribute in New England films distributed nationally by Sherpix.

The agreement to distribute Sherpix films in New England made in 1968 was a verbal agreement and did not obligate Ellis Gordon Films to distribute each and every film made or distributed by Sherpix.

Ellis Gordon films acted as a sub-distributor of the film "School Girl" during the period set forth in Count I of the Indictment pursuant to the 1968 agreement. In talking to Mr. Gordon, Mr. Shiffrin told him that "School Girl" was playing in the Lido East and the Cine Lido Theatres in New York, was doing quite well, and that it was an X-rated movie.

Although there was testimony that pictures are given X ratings for other reasons, the testimony shows that usually the X rating means that the movie contains explicit sexual activity.

Ellis Gordon arranged to distribute the film "School Girl" for exhibition at approximately fifteen threatres in the States

of Massachusetts, Connecticut, Vermont, and Maine. He did receive it via interstate shipment.

Ellis Gordon had an interest in the success or failure of other sub-distributors in the course of the distribution of the film "School Girl" on a national basis because the attendant notoriety and publicity made it a more saleable movie. Furthermore, the sub-distributors and the distributor were financially interested in an efficient and systematic method of making the copies available when and where needed.

The other defendants being considered by this ruling who were solicited and served as sub-distributors of the motion picture "School Girl" in a fashion similar to the defendant Ellis Gordon were as follows:

> Marvin Friedlander, an individual defendant, was the president of the defendant Marvin Marvin Films, Inc., a New York corporation. Their geographical area of sub-distribution was New York and New Jersey, where they did cause the movie "School Girl" to be shown. They also received and shipped the movie in interstate commerce.
>
> The individual defendant Marvin Zide and the corporate defendant Allied Film Exchange, Inc., sub-distributors of the movie "School Girl" for Detroit, Michigan. They did ship and receive a copy of the movie in an exchange via interstate commerce with persons or companies who were part of the distribution network.
>
> The individual defendant Jerome Sandy and the corporate defendant American International Pictures Exchange of Washington, D.C. served as sub-distributors who caused the movie "School Girl" to be exhibited in Norfolk, Virginia. They did ship and receive a copy of the movie in an exchange via interstate commerce with persons or companies who were part of the distribution network.

The individual defendant Abbott Morton Swartz and the corporate defendant Independant Film Distributors, Inc. contend that they were not in fact sub-distributors of the movie "School Girl." However, they had previously negotiated with Saul Shiffrin on behalf of Sherpix, Inc. to serve as a sub-distributor for several other films, including "The Stewardesses." They did cause the exhibition of the movie "School Girl" in Moline, Illinois; Des Moines, Iowa; Heron Lake, Minnesota; and Slayton, Minnesota, for which they received the sub-distributor's fee on three of those occasions, and they did cause copies of the movie "School Girl" to be shipped and received in interstate commerce. The individual defendant Emanuel Youngerman and the corporate defendant M. Y. Film Company, Inc. served as sub-distributors who caused the movie "School Girl" to be exhibited in parts of Pennsylvania and New Jersey. They did ship and receive a copy of the movie in exchange via interstate commerce with persons or companies who were part of the distribution network.

The individual defendant John O. Glaus, d/b/a John O. Glaus Agency, served as a sub-distributor who caused the movie "School Girl" to be exhibited in the geographical area known historically in the movie distribution industry as Western Pennsylvania. At the request of Sherpix, Inc., the distributor, John O. Glaus shipped the motion picture to Toledo, Ohio, and Buffalo, New York, in furtherance of the distribution and exhibition of the movie.

According to the stipulated proof, the individual defendant Louis Wolff was a long-time employee of the corporate defendant Harry Brandt Booking Office, Inc. A booking agent serves the movie industry in a different capacity from the sub-distributor. The booking agents provide a service to the exhibitors for a fee; namely, they obtain film for exhibition on certain dates. In order to be able to assure the exhibitor that a film would be

available the booking agent dealt with the distributor or sub-distributor, but only for the purpose of bringing the distributor or sub-distributor and the exhibitor together for further arrangements. At that time the booking agent stepped out of the picture.

In some instances in the initial stages of the distribution of a film the distributor will contact a booking agent known to represent certain exhibitors in order to build a reputation and acclaim for the film. In the instant case the proof reflects that Saul Shiffrin, acting for Sherpix, Inc., personally engaged in a conversation with Lou Wolff and encouraged him to initiate the necessary procedures at Brandt Booking Office to book "School Girl" for exhibition at Trans-Lux Theatre in Washington, D.C., in order to build acclaim for this X-rated movie. Later the necessary business arrangements between Sherpix and Harry Brandt Booking Office were made whereby "School Girl" was made available for exhibition at the Trans-Lux Theatre in Washington, D.C.

The distribution of the movie "School Girl" in the manner hereinbefore indicated occurred between a time on or about November 1, 1971, when the initial 35 mm print of "School Girl" was ready for distribution, and some date after July 31, 1972. "School Girl" was exhibited in 83 separate theatres located in 19 separate states. Before July 31, 1972, Sherpix had received approximately $211,000 as its distributors' share of the profits.

Sherpix and Art Theatre Guild, acting through its authorized employees caused "School Girl" to be shipped in interstate commerce to Memphis, Tennessee (Western District of Tennessee) on or about March 1, 1972. From on or about March 2, 1972, until May 25, 1972, "School Girl" was shown at the Studio Theatre in Memphis, Tennessee, one of the numerous theatres operated by Art Theatre Guild in various parts of the United States.

On or about June 15, 1972, Sherpix caused a print of "School Girl" to be shipped by common carrier from Memphis, Tennessee, to the sub-distributor Allied Film Exchange at Detroit, Michigan.

On or about June 5, 1972, Gordon Craddock, an individual co-defendant, acting for Craddock Films, Inc., a corporate co-defendant, caused a print of the movie "School Girl" to be shipped by interstate commerce to Memphis, Tennessee, and subsequently to Springdale, Arkansas, from Memphis, Tennessee.

Scienter

When the Indictment charges a conspiracy to transport an obscene motion picture in interstate commerce, it is not necessary for the government to prove that the conspirators had actual knowledge that the film was obscene. The scienter required to support a conviction is that they knew the general nature and character of the films. *US v. Marks*, 520 F.2d 913, 917 (C.A.6 1975), rev'd on other grounds, *Marks v. US*, — U.S. — (Mar. 1, 1977); 45 USLW 4233 (Mar. 1, 1977). In the instant case the government relied upon circumstantial evidence in the cases against the defendants covered by this ruling.

The words "hard core," "pornography," "porn," "porno," "stag," "erotic," "sexploitation," and "sensual" mean to an adult person whose livelihood is derived from full-time employment in the motion picture distribution business that the general nature and character of the motion picture film in question is one depicting, representing, and describing actual or simulated sexual activity.

Sherpix, prior to August 26, 1971, and continuing thereafter, was a national distributor of motion picture films which conducted its business from New York, New York.

Weekly Variety was in 1971 and 1972 and had been for many years prior to that time, a tradepaper distributed throughout the motion picture industry used as a vehicle of communication, advertisement, and informational source, and was used by persons whose livelihood is derived by motion picture films distribution as a tool for conducting business.

On February 10, 1971, *Weekly Variety* contained a review of a motion picture entitled "The Story Of F," describing it as "unadulterated stag," "erotica," and "for hardcore buffs," and showing the distributor as Sherpix.

On February 10, 1971, *Weekly Variety* published a news article describing a motion picture film entitled "Mona" in bold 5/16ths-inch headline print as "Hardcore." The news article continues making reference to "rough sex material," "an extended stag film," and "the porno . . . dollar." The film is reported to be a Sherpix film. The article continues, making reference to "Adultery For Fun And Profit," soon to be released, as a film like "Mona."

Weekly Variety of February 24, 1971, contained a film review of a motion picture film entitled "Mona," describing it in some detail and again noting that it was being distributed by Sherpix.

On May 26, 1971, *Weekly Variety* published a film review of a motion picture film entitled "Pink Narcissus" consuming approximately 14 inches of one column, describing it in some detail and summarizing it as "a 70-minute masturbation fantasy" with an X rating and being distributed by Sherpix.

On June 23, 1971, *Weekly Variety* published a film review of a motion picture film entitled "Sub Rosa Rising" with a subtitle, "Sex In San Francisco," describing it in some detail, saying that it contained "peep at grindhouses and stag films, testimonies from all sides—literally—aimed at spelling sexploits

among heteros, homos and bestial lovers." This motion picture film is shown to be distributed by Sherpix.

On May 3, 1972, *Weekly Variety* carried a two-column bold print headline concerning the Dutch Erotica Film Festival, sometimes known as the Wet Dream Film Festival, to be held in Amsterdam, Holland. The article refers to the fact that the president of Sherpix, Inc. (Louis Sher) obtained the film "Adultery For Fun And Profit" at the previous festival and has agreed to pay $1,000 for the first prize in the upcoming festival and to promise $5,000 in business to any films entered in the festival which Sherpix considers to be profitable for distribution in the United States.

On October 20, 1971, and October 27, 1977, *Weekly Variety* published full page advertisements for Sherpix, advertising the film "House Of Wax" being distributed by it as a general release film. Said advertisements contained information blocked off in an approximately three-and-one-half-inch vertical block which spanned the width of the page describing how and from whom the film could be obtained. This information stated, "From the crew who gave you 'THE STEWARDESSES,' Sherpix, Inc. . . . and our local representatives . . ." Thereafter, the names, addresses and telephone numbers are listed for the following subdistributor defendants in the instant case: Jerry Sandy, Ellis Gordon, Manny Youngerman, John Glaus, Marty Zide, Abbott Swartz, and Marvin Friedlander.

On November 3, 1971, *Weekly Variety* published a two-column headlined news article reporting the results of the move festival at Amsterdam, Holland. Concerning the festival, the article reported "its predecessor was one of the first 'above ground' fests dedicated to the pornographic film, this year's fest was only one of several showcasing hard porn." The article continued, noting that Sherpix had entered three films in the festival, including "School Girl" and noting further that "School Girl" won the first prize.

On January 12, 1972, *Weekly Variety* published a news article on page 5 with a bold two-column headline stating, "N.Y. Pornopix 'Harrassment' Beaten; Some Doubt Smartness of Big Defy; Slowness of Law Favors Sites." The article continues and one column is continued on a second page. The second paragraph of the article concerns the fact that the motion picture film "School Girl," distributed by Sherpix, had won the Amsterdam Festival and had been seized by the New York Police Department while playing at the Cine Lido and the Lido East Theatres in New York, New York.

On February 2, 1972, Weekly Variety on page 5 published under a column headline a news article concerning the Cine Lido Theatre in New York City describing it as the "flagship location for hardcore porno features." The article continues for an entire column and details the history of the theatre and refers to the fact that it had just completed a successful exhibition of the film "School Girl" distributed by Sherpix.

On September 27, 1972, *Weekly Variety* published a short news interest article on page 3 under the headline "It's Porno Biz As Usual." The article reports concerning exhibitions of sex-related films in New York City referring specifically to the Hollywood Twin theatres, stating "the twin houses have played 16m loops and hardcore feature subruns like 'School Girl' and 'Mona.' "

The original version of the motion picture film entitled "The Stewardesses," which admittedly was an outstanding box office success, depicts total male and female nudity with scenes showing male and female participants in sexual intercourse without showing actual penetration, and depicts lesbianism with c:al contact clearly showing.

Ellis Gordon sub-distributed, for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres

for 47 separate exhibitions between March 5, 1971, and November 2, 1972.

Marvin Friedlander, by and through Marvin Films, Inc., sub-distributed, for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 110 separate exhibitions between March 1971 and January 1973.

Martin Zide, by and through Allied Film Exchange, Inc., sub-distributed, for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 67 separate exhibitions, 13 of which are admitted to be in the X-Rated versions, between May 19, 1971, and October 26, 1972.

Jerome Sandy, by and through American International Pictures Exchange of Washington, D.C., Inc., sub-distributed for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 22 separate exhibitions between February 24, 1971, and March 21, 1972.

Abbott Morton Swartz, by and through Independent Film Distributors, Inc., sub-distributed for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 102 separate exhibitions between February 26, 1971, and December 4, 1973.

Emanuel Youngerman, by and through M.Y. Film Company, Inc., sub-distributed for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to a theatre for exhibition between January 5, 1972, and February 15, 1972.

John O. Glaus sub-distributed, for and on behalf of Sherpix, Inc., to theatres the motion picture film entitled "The Stewardesses" for 54 separate exhibitions between March 13, 1971, and September 11, 1973.

There were four other movies which were distributed by Sherpix and sub-distributed by the defendants Gordon; Friedlander; Marvin Films, Inc.; Zide; Allied Film Exchange, Inc.; Jerome Sandy; American International Pictures Exchange of Washington, D. C., Inc.; Abbott Morton Swartz; Independent Film Distributors, Inc.; Emanuel Youngerman; M.Y. Film Company, Inc.; and John O. Glaus, prior to or during the period during which they sub-distributed "School Girl." Those movies all depict oral sex, sexual intercourse, lesbianism, and exhibition of the genitals with sexual activity portrayed showing actual contact and penetration. The movies were "Mona," "Adultery for Fun and Profit," "History of the Blue Movie," and "Hollywood Blue."

On June 21, 1972, in the movie advertisement section of *The Detroit Free Press*, there was published an advertisement measuring approximately 7½ by 4½ inches showing a young female nude from the waist up with arms crossed over her breasts stating that the motion picture film *"School Girl"* was being exhibited at four neighborhood theatres. The advertisement contains the words in bold print, "How Much Mischief Can A Girl Get Into . . . If She Really Tries!" The advertisement further states that the film is "A new lesson in erotica by Beyond The Pleasure Principle."[2] It shows the film to be X-Rated and for adults only. It further states that the film was the grand prize winner at the Amsterdam Erotic Film Festival.

On November 23, 1971, *The New York Times* had published the same advertisement on page 55, showing the film to be premiering on that date at the Cine Lido and the Lido East theatres in New York City. This advertisement varies only in that it does not show the film to be X-rated, but has

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[2] This ad was used in various forms throughout the period of distribution of the movie. The art work and format were obtained by Sherpix on or before November 10, 1971.

the word "Sex" written and further notes that it is a Sherpix release. Also, this ad is approximately 5 by 3 inches.

On February 2, 1972, a similar but not identical advertisement appeared in *The New York Times* advertising that the film was playing at 16 separate theatres in the New York City area including New Jersey.

On December 17, 1971, *The New York Times* had published the same advertisement which originally was published on November 23, 1971 for the Cine Lido and the Lido East theatres in New York City, except that the ad was reduced to 1½ by 2½ inches and carried the additional notation that it was playing in its second month.

The Washington Post and *The Evening Star and Daily News* in Washington, D.C., published in each of its editions from August 9, 1972, through October 3, 1972, a 2-inch by 1½-inch movie advertisement for "School Girl" showing it to be playing at the Translux Theatre. This advertisement shows only the upper torso of a nude girl with her arms crossed over her breasts, the notation "How Much Mischief Can A Girl Get Into . . . If She Really Tries!", and the notation, "For Adults Only."

From March 1, 1972, through March 4, 1972, *The Pittsburgh Press* newspaper and *The Pittsburgh Post Gazette* newspaper published a movie advertisement measuring 2 by 4 inches advertising that the motion picture film "School Girl" was being exhibited at the Art Cinema. This advertisement bears the silhouette of a nude female with the notation, "New Hot Show Today Absolutely Unbelievable" and "No One Under 18 Admitted." The advertisement shows the motion picture film "School Girl" as being exhibited with another motion picture film entitled "Peddlers of Sin."

Obscenity

As heretofore indicated when this non-jury phase of the case was tried in January 1976, the issue of obscenity was submitted without expert proof and with the understanding that the Court would be the trier of fact on the issue, based upon the Court's viewing of the movie. At the time, the law in this Circuit was considered to be that *Miller v. California, supra,* standards were applicable to cases involving acts committed before the decision in *Miller* was announced June 21, 1973. This was based upon the holding of the majority in *United States v. Marks,* 520 F.2d 913 (C.A. 6, July 30, 1975). However, the Sixth Circuit ruling in *Marks* was reversed and remanded in *Marks v. United States,* —U.S.— (March 1, 1977). In that opinion the Supreme Court indicated that persons indicted for conduct occurring prior to the decision in *Miller* were entitled to a finding that materials were not obscene unless they are "utterly without redeeming social value," as required by *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). In the *Marks* opinion the Supreme Court also held that in pre *Miller* conduct cases the defendants are entitled to "any constitutional principle enunciated in *Miller* which would serve to benefit" them. Footnote 3 of the *Marks* opinion provides:

> *Miller* held:
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24.
>
> Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the

sexual conduct, depiction of which is forbidden. The Court in *Miller* offered examples of what a State might constitutionally choose to regulate:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S., at 25.

Applying tests set as required in Marks, this Court finds that the motion picture "School Girl" is in fact obscene. The Court has seen it two times in what is believed to be its entirety and in the form that it was caused to be transported and shown by the defendants herein. It is hard core pornography.

The school girl portrayed in the movie is a college student who undertakes to research a sex subculture. In order to do this she responds to certain classified ads in the college underground newspaper. This leads to a series of sexual episodes which include having sexual intercourse with a husband under the wife's direction and ultimate participation as a third party, mutual masturbation pursuant to direction from a man over the telephone, sexual intercourse oral and otherwise with a father and son team, and a group sex orgy. In addition, there are episodes in which complete actual and prolonged sexual intercourse between the school girl and her boyfriend is shown. There is a similar episode portrayed between the school girl's female roommate and the school girl's male professor who called at their apartment to inquire about the welfare of the school girl. In addition the school girl and her female roommate are shown in a prolonged lesbian episode.

All episodes show close shots of the genitals of the participants during the sexual encounters.

Summary and Conclusion

This Court concludes that the defendants Ellis Gordon, Marvin Friedlander; Marvin Films, Inc.; Martin Zide; Allied Film Exchange, Inc.; Jerome Sandy; American International Exchange of Washington, D.C., Inc.; Abbott Morton Swartz; Independent Film Distributors, Inc.; Emanuel Youngerman; M. Y. Film Company, Inc.; and John O. Glaus entered into a conspiracy with Saul Shiffrin; Sherpix, Inc.; Art Theatre Guild, Inc.; and others, including Gordon Craddock, to distribute the obscene motion picture "School Girl" on a multi-state basis by shipping and receiving copies of the movie by common carrier and otherwise in interstate commerce. This conspiracy was in existence from on or about November 1, 1971, until on or about October 3, 1972.

During the existence of this multi-state conspiracy at least three overt acts included in the Indictment were committed by members of the conspiracy in the Western District of Tennessee.

During the existence of the conspiracy the above mentioned defendants knew the general nature and character of the movie "School Girl," which the Court has found to be obscene in fact.

This Court concludes that the defendants Richard Lewis Miller and Lou Wolff and Harry Brandt Booking Office, Inc., should be found not guilty because the proof does not establish that they joined the distribution conspiracy which the Court has found to exist with regard to certain other defendants.

While the Court is convinced that the person who appeared at the trial and said his name was Richard Louis Miller and the persons referred to in the Indictment as Richard Lewis Miller and R. L. Mills are all one and the same person, the Court concludes that Miller's participation in the distribution of the

movie "School Girl" terminated with its outright sale in California. He retained no royalties or other forms of participation in the profits from the exhibition of it. The government argues that Miller had a continuing interest in its success because that would enhance the value of future productions under the name R. L. Mills and the other identifying phases of the credits; however, there is no proof to support the argument that other movies owned by him were in being or even planned at the time of the sale. Although the proof does establish that the defendant Miller knew the nature and character of the movie later determined to be obscene, the Court does find him not guilty as charged in the indictment.

Because the defendants Lou Wolff and Harry Brandt Booking Office, Inc. participated in the distribution and exhibition of the movie "School Girl" in a different fashion from the abovenamed defendants who were part of the distribution conspiracy, the Court concludes that they were not members of the distribution conspiracy shown by the proof. Booking agents function for a limited purpose in the distribution and exhibition of a movie. They bring the distributor and the exhibitor together for a flat fee, not a percentage of the receipts. They do not assume responsibility for the manner and means of the delivery and forwarding of a movie shipped to an exhibitor. In the instant case the proof applicable to them is minimal, and in the opinion of the Court does not establish that they knowingly joined the continuing distribution conspiracy. Therefore the Court concludes that Lou Wolff and Harry Brandt Booking Office, Inc. are not guilty as charged in the Indictment in this case.

The Court regrets the protracted delay that has occurred between the commission of the conduct included in the crime charged and this ruling on the case. Particularly, because the proof reflects that all individual defendants were actively and openly engaged in the movie industry. Substantial phases of

the delay were caused by stays which were implemented pending rulings on appeals in other cases which appeared to have issues relevant to this case. In addition to the stay occasioned by the *Marks* case as mentioned above, this case was stayed pending an appeal of a ruling on a Motion to Dismiss in another case which was pending in this District.

This is made even more regrettable by virtue of the fact that the law in cases of this kind has been so difficult to interpret and apply, thereby causing great controversy for the public and governmental officials in all levels of all branches of the federal, state, and local governments. However, the Supreme Court consistently has held that obscene motion picture films are not protected by the First Amendment to the United States Constitution and Congress has seen fit to make the transportation of obscene motion picture films by common carrier a criminal offense. The above ruling is this Court's application of the facts of this case to the above mentioned principles of law and the numerous authorities which have spoken to those principles.

The Court is of the opinion that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion without a pre-sentence investigation. Therefore, the Clerk is directed to notify all defendants found guilty herein that the sentencing hearing will be conducted in *Courtroom Number 2, United States Courthouse, Memphis, Tennessee, at 1:30 P.M., Friday, August 19, 1977.*

ENTER: This 28th day of July 1977.

/s/ ROBERT M. McRAE, JR., Judge
United States District Court

Extension of Time for Filing Motion for New Trial

Because the attorneys for the defendants must be notified of this ruling by mail, the Court hereby extends the time for filing a Motion for New Trial to fifteen days from the date hereof, in the event that any defendant wishes to file a Motion for New Trial.

/s/ ROBERT M. McRAE, JR., Judge

Supreme Court, U. S.
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No. 79-503

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARVIN FRIEDLANDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the evidence failed to establish their membership in a conspiracy to distribute an obscene film in interstate commerce; (2) that there was no venue in the Western District of Tennessee; and (3) that they were tried under an improper standard of obscenity.

Petitioners' co-defendants have filed a separate petition for a writ of certiorari, raising the same questions. *Gordon* v. *United States*, No. 79-313. In our brief in opposition in that case, we have set forth the facts and answered the venue question and the related question regarding the proper community standards. We have also answered the claim that petitioners were prejudiced because their trial was conducted under the obscenity

standards of *Miller* v. *California*, 413 U.S. 15 (1973) while the ultimate question of guilt was determined under the test of *Roth* v. *United States*, 354 U.S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). We rely here on our opposition in *Gordon*, a copy of which we are sending to petitioners.

We do, however, elaborate on the sufficiency of evidence connecting these petitioners to the conspiracy.

Petitioners essentially contend (Pet. 9-12) that they were not tied to a single conspiracy to distribute an obscene film, and, further, that the acquittal of defendants Sherpix and Art Theatre Guild on the conspiracy count in the jury trial warrants reversal of their conspiracy conviction. These claims were properly rejected by both courts below. The district court found that a conspiracy existed between petitioners and Shiffrin, and Shiffrin's stipulated testimony supports that finding. See Pet. App. A-12 to A-13, A. 712-716.[1] As the court of appeals observed (Pet. App. A-9 to A-10):

> Unindicted but named co-conspirator Saul Shiffrin, Executive Vice President of Sherpix and Art Theatre Guild, supplied that link in ample measure and it was his testimony which connected the defendants one to another * * *. The indictment alleged and the proofs showed numerous overt acts undertaken by Shiffrin, notably arranging to transport the film into and out of the district of trial and contracting for the sub-distribution of "School Girl" with the defendants.

On the claim that acquittal of some defendants invalidated the convictions of petitioners, the court of appeals stated (Pet. App. A-12):

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[1] "A." refers to the joint appendix in the court of appeals.

> More fundamentally, however, we do not view the acquittal of Sherpix, Art Theatre Guild, Craddock and Craddock Films on the conspiracy charge as conclusive evidence that, for the purposes here, they did not actually commit the overt acts charged to them in the indictment. See *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, 898 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951).

Shiffrin's testimony connected petitioners to the nationwide distribution scheme, and the "interdependence of the subdistributors and their agreement to act in concert with one another in the circulation of the film * * * tied them together in a single criminal undertaking" (Pet. App. A-11). See *Hyde* v. *United States*, 225 U.S. 347, 365-367 (1912).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979